89-1657



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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DUANE JOSEPH TILLIMON,

Petitioner,

VS.

STATE OF OHIO,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

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## QUESTIONS PRESENTED FOR REVIEW

1. In a criminal prosecution for gross sexual imposition where an adult man is charged with loving the parts of a 5 year old boy, and then touching the boy's penis and buttocks, and the case turns on the credibility of the 5 year old boy, and the adult defendant, the 5 year old boy saying on the charge,"...I told him (His Father) that he did it, but really, I don't really know.; does the State deny Defendant a Fair Trial guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, if the Prosecutor elicits an answer that Defendant refused to take a Lie Detector Test, which on objection, is stricken by the Court, and later, on cross-examination, the

Prosecutor asks Defendant if Defendant in the presence of the Police Officer refused to take a Lie Detector test, and thereupon the Court refused to declare a Mistrial?

2. In the case at bar, does the limitation on a 5 year old to understand the oath and to communicate accurately, even with help from the Prosecutor, the failure of the Prosecutor effectively to comply with the Motion for Separation of Witnesses by telling the State's Witnesses not to talk with each other after testifying, and the inconsistencies of the State's adult witnesses' testimony, here call cumulatively for a judicial declaration that Petitioner Tillimon was denied his constitutional guarantee of a fair trial and due process of law?

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TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

DUANE JOSEPH TILLIMON,

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To The Ohio Supreme Court

## OPINIONS BELOW

The only Opinion so far in this case is that of the Court of Appeals, Sixth Judicial District, Lucas County, Ohio, of June 9, 1989, a copy of which is in the Appendix herein, at pages A1.

STATEMENT OF GROUNDS
FOR THE
SUPREME COURT OF THE
UNITED STATES

On November the 15th, 1989, the Supreme Court of Ohio, by its entry of that date, denied Petitioner's Motion to Certify the Record, and this Petition for Writ of Certiorari to the Ohio Supreme Court and the lower Ohio Courts, is filed within ninety days of the said entry of the Ohio Supreme Court. Jurisdiction had been validly invoked in the Ohio Supreme Court, by filing a Notice of Appeal in the Sixth Judicial District Court of Appeals, for Lucas County, on July the 7th, 1989, and then, within the thirty day requirement of the Rules, Petitioner had filed his Memorandum in Support of Jurisdiction in the Ohio Supreme Court, on August the 3rd, 1989.

Prior thereto, after the Judgment and Court Order of Sentence, of July the 26th, 1988, the Petitioner had timely filed his

Notice of Appeal to the Sixth Judicial District Court of Appeals for Lucas County, Ohio, on August the 11th, 1988. Thus, all the filings required by the Rules have been timely and validly filed, and this Petition for Writ of Certiorari is timely and validly filed. Each of the above mentioned filings is reproduced in the Appendix to this Petition, except the Memorandum in Support of Jurisdiction, filed in the Ohio Supreme Court.

## STATUTES CONFERRING JURISDICTION ON THE SUPREME COURT OF THE UNITED STATES OF AMERICA

28 U.S.C. 1257, as found in 12 Moore's Federal Practice, at page 8-12 reads in parts here material,

> 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against the validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

[As amended July 29, ]970, Pub L 91-358, § 172(a), 84 Stat 590.]

FIFTH, SIXTH, SECTION ],
AND, FOURTEENTH AMENDMENTS
TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;to be confronted with the witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On or about the 1st day of April, 1988 the jurors of the Lucas County Grand Jury issued an indictment charging the Defendant with a violation of Ohio Revised Code §2907.05 (A) (3), this being a felong of the third degree. On June 28, 1988 a jury was duly impaneled and trial commenced.

During said trial testimony was elicited on direct examination by the prosecutor from a state's witness concerning a "lie detector" test and an objection was duly entered. (Transcript at p. 55, hereinafter T. p. ____). Subsequently, during the cross examination of the Defendant the prosecution again attempted to elicit testimony concerning the "lie detector" and an objection and motion for mistrial was made (T. p. 253) and subsequently overruled by the trial court (T. pp. 252-265).

Following the taking of testimony by

both the State and the Defendant, arguments of counsel, and deliberations by the jury, a verdict of guilty was entered on the one and only count of the indictment and on the 26th day of July, 1988, the Defendant was sentenced to a period of incarceration and required to pay a fine. The incarceration portion of the sentence was suspended on the condition that the Defendant be incarcerated in the Lucas County Jail for a short period of time and that he be placed on probation for an additional period of time.

Prior to sentencing the Defendant moved for a new trial and moved for a judgment of acquittal. These motions were filed on July 11, 1988 and were overruled by the Trial court on July 26, 1988.

## STATEMENT OF FACTS

Duane Joseph Tillimon, hereinafter referred to as Appellant, was charged with engaging in sexual contact with a youngster, Antonio Hernandez, not his spounse, the said

years of age. This is all inviolation of Ohio Revised Code §2907.05 (A) (3). The basic claim of the prosecution was that the Appellant entered into a restroom area at McDonald's, Toledo, Ohio, in which the child was present and at some time during their presence together in the restroom area, the Appellant touched the genitalia, i.e., penis, and buttocks of the child.

During the questioning of Gaspar Hernandez, the father of the child, Mr. Hernandez, in response to questioning by the prosecutor said in part:

> "....and Officer Holt got between us and said just calm down, we'll figure this all out later. You're going to end up taking a lie detector test, and he said I'm not taking nothing unles he takes one first, and I said I don't have a problem with it, and at that point there --
>
> MR. NEWCOMER: Your Honer, I'll move to strike that testimony.
>
> THE COURT: Motion will be granted. The testimony that was just given by the witness will be stricken and the jurors will be instructed to disregard it as I have earlier instructed you that I might

in the event that a motion to strike was granted."

Later in the trial, during the cross examination fo the Petitioner Tillimon, the prosecution gueried at TR 252:

> "Q And it's your testimony that in the presence of Mr. -- or Officer Hold you indicated that you would take a lie detector test, or there was some talk about taking a lie detector test?
>
> MR. NEWCOMER: Your Honor, can we approach the bench?
>
> THE COURT: Yes.
> (Thereupon, an off-the-record discussion was had at the Bence.)
>
> THE COURT: I'm going to sustain the objection."

At that time a motion for a mistrial was made on behalf of the Appellant based on the fact that he was questioned about an offer or an allegation of an offer that he made to take a lie detector test. The court overruled the motion and give a limiting instruction to the jury. The entire dialogue that took place concerning the query about the lie detector test is contained in the transcript

in pages 252 through 265. The actual motion for a mistrial is noted on page 253. The Transcript on this reads at page 252:

"(Thereupon, the following proceedings were had in Chambers:)

THE COURT: Okay, we're in chambers on the record. Defendant is present with counsel, and the prosecutor is here in the person of Mr. Mandross, and we're out of the hearing of the jury. There has been an objection made and a motion made by Mr. Newcomer for a mistrial based on the questioning of the defendant as to an offer or an allegation of an offer that he made to take a lie detector test. Now, Mr. Newcomer, do you want to be heard on your motion?

MR. NEWCOMER: Your Honor, I think when Mr. Hernandez was asked a question and before objection could be made, made some reference to polygraph examination or lie detector examination. There was an objection and there was a motion to strike the testimony, and the Court granted that motion and indicated that it was impermissible area of questioning and admonished the jury that they should not take that into any consideration in thier deliberations.

I think in this particular instance the question has been asked again. I think the prosecution knows that it is an impermissible area to question defendant on, and in fact if any records are brought forward that have anything in it normally those -- any relationship, or any mention of polygraph examinations are specifically deleted, and the only time

that -- that that type of evidence can be gotten in is if the plaintiff -- or the State and the defendant agree to take a polygraph examination and to have the results admitted.

The damage has been done at this point. I've made an objection. He's asked the question, you know. He's going to have to either answer the question or not answer the question, and whatever it is, the inference is going to be that Mr. Tillimon refused to take a polygraph examination, and Ithink that it's twice now in this trial that it's happened and the damage is done. These people are not sophisticated enough if going to have testimony about polygraph examinations in here to get it out of their minds. It's too late. It's been heard."

Prosecutor Mandross then referred to a hand written statement, by Petitioner, which was never admitted into evidence, which statement Petitioner had/given by Attorney Newcomer to Prosecutor Mandross. Prosecutor Mandross argued, at TR 255:

"MR MANDROSS: Your Honor, defense counsel referred to a three-page statement that the defendant wrote out, and the second page of that statement in the third paragraph the defendant in his own hand wrote, "The officer said to me, will you take a lie detector test?' I said, Yes,' "I being Mr. Tillimon. "The officer than took our names. I said, The man' " -- I being the defendant --" The man should take a lie detector test too,' but the

man did not respond." In fact the defendant even put in quotes will you take a lie detector test quote unquate, and his statement, "The man should take a lie detector test too."

I have no problem with a limiting instruction to the jury saying they are not to consider the issue of a lie detector test. I have -- I am not going to ask him whether he took the test or not. I'm not interested in the results of any test, because it didn't happen. The purpose of that question is Officer Holt is going to testify that he never brought up the issue of a lie detector. Officer Holt is going to testify that Mr. Tillimon never said the other man should take a lie detector too.

This whole case evolves around the credibility of a 7-year-old boy and the credibility of the defendant, and if I can bring in testimony that shows that he is testifying in court differently -- he put into writing things that an officer from the Toledo Police Department says is a total fabrication. That certainly should be something the jury should be allowed to consider.

I have no problem with telling -- instructing the jury not to consider the issue itself of a lie detector, whether he took it or not or the results. That's not the focus of my question. I'm interested in whether that statement was

actually made. He says it was. Officer Holt is going to say that's a fabrication.

MR. NEWCOMER: First of all, Your Honor, that's coming in in the back door. Whether the officer asked it or not really isn't material. The problem is the whold thing that Mr. Mandross wants is to get the issue of the polygraph before the jury. I mean, let's just be honest about it.

MR. MANDROSS: No.

MR. NEWCOMER: It doesn't have anything to do with picking out little things as far as if someone's credibility is at stake at this point. It's a question that was asked did you agree to take a polygraph. That's what the question was asked. It didn't have anything to do with did Officer Holt ask it, did anything else like this happen, and that's why the damage is, and if you were going to do it that way, it wasn't done properly.

Second of all, that thing has never been asked to be introduced into evidence. It's a recollection of events that the defendant made at the time. It's not under oath. It was something to assist him, and we gave it to the prosecution, but Mr. Mandross should know that you do not make those comments about the polygrap, and I think that this trial should be terminated at this point and our motion should be granted.

"THE COURT: Well, on cross-examination the credibility of the witmess is at stake, and that's the purpose of cross-examination -- one of the purposes of cross-examination. However, in the area of polygraph tests, I agree that polygraph tests obviously are not admissible except under very limited circumstances. I'm going to sustain you objection, but I'm going to deny your motion for a mistrial, and I will prepare and instruction to the jury regarding the admissibility of lie detector tests, and I will instruct the jury to disregard the question as it was not ansered, and instruct them on the fact that polygraph tests or the results of polygraph tests are not admissible even when --"

The Court then declined Prosecutor's Offer to have Officer Holt testify to show Prosecutor Mandross' Pro-Offer was correct, Tr 259 et seq.

It should be duly noted and emphasized the comment of Prosecutor Mandross with regard to the lie detector offer that he made during the discussion in chamers, was made, despite testimony to the contrary by his own witness Mr. Gasper Hernan-

dez, as quoted above at TR 55 and corroborates the written statement of the defendandant.

STATEMENT OF FACTS SHOWING STATE'S IMPERMISSIBLE EVIDENCE ON DEFENDANT'S ALLEGED UNWILLINGNESS TO TAKE LIE DETECTOR TEST WAS PREJUDICIAL, IN VIEW OF 5 YEAR OLD'S ACKNOWLEDGMENT THAT HE WASN'T SURE DEFENDANT HAD DONE ANYTHING, AND, CUMULATIVELY, THE CONFLICTING INCONSISTENCIES, AND WEAKNESS OF THE STATE'S WITNESS AND CASE.

The child's version of the events leading up to the alleged offense are rather unclear and it is necessary to review his recollection of those events.

Appellant initially objected to Antonio's qualifications to testify. A series of questions were asked by the trial judge, the prosecutor, and the defense attorney. The content of these questions and his responses are contained in the transcript at pages 94 through ]08. On page ]06, the objection to his testimony was made by the Appellant. This was overruled by the

trial judge. During his direct examination and cross examination the child indicated that the Appellant had pulled his pants down at least three times. He first testified after being asked if he used the bathroom that:

> Uh huh, and he was watching me. He pulled my pants down again like he did. (T. p. ]52).

This first statement referred to the period of time in which the child was using the toilet as opposed to the urinal. He then further testified that the Appellant pulled his pants down again and that that was when he was touched. (T. p. ]53.)

During cross examination the child identified the diagram of the restroom at the McDonald's Restaurant in Northtowne Mall and then was questioned about his activities in the urinal and toilet area. He indicated that he was trying to use the urinal and that even though he could

almost reach it it was hard. It was then that he indicated that the defendant lifted him up and that the Defendant took his pants down. (T. p. ]63). He then contradicted himself by indicating that his pants were already down when he was lifted up. (T. p. ]64). In response to the question, "Okay. He didn't do anything to you then, did he?". Answer, "No. Se then he put me - - ." (T. p. ]64).

The child then testified that the Appellant assisted in opening the door to the toilet area and that he then went nto the toilet area. The child again testified that the Appellant pulled his pants all the way down to his legs (T. p. ]67). However, he then states that as he was standing there that he pulled them back up and looked back and that he (Appellant) was watching him. (T. p. ]67). He stated, "He was standing by the door.

It was open a little bit." (T. p. 167). When he asked to describe how much is a little bit such a couple of inches, he stated, "Kind of smaller, I guess." (T. p. 168). He then indicated that he tried to keep it as shut as much as he could (T. p. 168).

He then indicates that he exited the urinal area being followed by the Appellant and that when he was actually touched by the Appellant that his dad was leaning against the door. He said he knew that because he saw his dad when the man left he could see his dad against the doorway. (T. p. ]69). His father, Gaspar Hernandez, testified that:

> "Antonio was at the sink right over hear washing his hands. There was a man standing directly behind him again, and as I leaned back, I opened the door a little bit and I saw the guy standing behind him with his hands his pants like this, and that's when I came out the

second time, he was gone out the second door.
(T. p. 43).

After seeing this action he testified that he closed the door to see if his other boy Adrian was done or not and that when he opened the door again the gentleman was gone. (T. p. 42). This is important inasmuch as it is obvious that Antonio did not see his father leaning against the door as he claimed.

It was at this juncture that when Antonio's father exited the commode area that Antonio allegedly indicated what the Appellant had allegedly done to him.

Q. (By Mr. Mandross) Antonio, I'm not clear on something, and maybe you can help me with this. When you said the man touched your penis --

A. (Nodded affirmatively)

Q. (Continuing) -- can you tell me in a little more detail what exactly he did? Can you use your hand to show me.
(T. p. 155).

At this point Prosecutor Mandross bent his knee to the floor and gave hand signals to Antonio how he wanted him to respond. The defendant entered an objection, an off the record discussion was held at the bench, and the objection was sustained. As far as what happened, Antonio was asked:

Q. (By Mandross) Antonio, held me out there, can you?

A. I'm not sure. I don't really know.

Q. Well do you remember telling your dad what the man did?

A. Yes.

Q. What -- how did you explain it to your dad?

A. I told him that he did it, but really, I really don't know. (emphasis added.)

Q. You can't really describe in more detail how he touched you?

A. (Indicated negatively). (T. p. 155, 156).

## REASONS FOR GRANTING THE WRIT

### I. THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT ON THE PREJUDICE AND DENIAL OF CONSTITUTIONAL RIGHTS RESULTING FROM THE PROSECUTOR'S QUESTIONING A DEFENDANT ON HIS UNWILLINGNESS TO TAKE A LIE DETECTOR TEST.

### IA. FEDERAL COURT OF APPEALS CASE FINDING A VIOLATION OF CONSTITUTIONAL RIGHTS, AND PREJUDICIAL ERROR FOUND.

In United States v. Brevard, 739 F. 739 F. 2d 180 (CA 4, 1984), the Prosecution's witness stated which could be interpreted that Defendant Brevard took a Lie Detector Test, and then afterwards the FBI decided to arrest him. These points are made clear in 739 F. 2d at page 182:

> [1,2] Evidence that the accused or a witness had taken a polygraph test is inadmissible. See United State v. Holman, 680 F. 2d 1340, 1351-52 (11th Cir. 1982). Where an impermissible reference to a polygraph has been interjected, the court usually may cure the

error by striking the evidence and instructing the jury to disregard it. See, e.g. Holman, 680 F 2d. at 1352; United States v. Smith, 565 F 2d. 292, 295 (4th Cit. 1977) Curative instructions, however, are not always adequate. There are instances where the jury is exposed to inadmissible evidence which could make such a strong impression that instructions to disregard it may not remove its prejudicial effect. See Bruton v. United States, 391 U.S. 123, 129-35, 88 S. CT. 1620, 1624-27, 20 L.Ed. 2d 476 (1968); Throckmorton v. Holt, 180 U.S. 522, 567, 21 S. Ct. 474, 480, 45 L.Ed, 633 (1901).

[3] The most important questions to consider in determining whether a curative instruction or a mistrial is appropriate after a reference to a polygraph test are these: (1) whether an inference about the result of the test may be critical in assessing the witness's credibility, and (2) whether the witness's credibility is vital to the case. See State v. Edwards, 412 A2d 983, 985 (Me. 1980). Obvioulsy, when the witness is a defendant who asserts an alibi, the answers to these questions assume added significance.

[4] In this case, the jury could have drawn an inference from

the polygraph references that was damaging to Brevard. The FBI agent who made the remarks testified that, before going to the FBI office with Brevard for the polygraphy test, "I didn't know at that time whether to believe his story or not." Because the FBI had not charged Brevard before the visit, and he was subsequently indicted, the jury could have inferred that the decision to proceed against him was based partly on the results of the polygraph test and that Brevard had failed it. This inference could have been critical in undermining Brevard's credibility.

This inference could have been especially prejudicial to Brevard because his credibility was a vital issue at trial. Apart from the testimony of some eyewitnesses, which was in certain particulars inconsistent, the evidence against Brevard was circumstantial and partially conjectural. Brevard had an honorable discharge from the Navy. He had worked at the Government Printing Office and was currently employed by the Internal Revenue Service. His counsel elicitied testimony from FBI agents that Brevard had cooperated fully with them. The clerk at smal claims court, Brevard's supervisor, and the woman with whom he lived corroborated the parts of his account within their knowledge. But, in the end,

his defense rested on the jury's willingness to believe his seemingly plausible description of his activities on the morning of the robbery in the fact of plausible conflicting evidence.

The government argues that this court's decision in United States v. Smith, 565 F.2d 292 (4th Cir. 1977) requires affirmance here. In Smith, the government improperly questioned a witness about taking a polygraph examination. Applying the general rule, we hald that a new trial was not warranted where the district judge struck the evidence and instructed the jury to disregard it. 565 F2d at 295. In that case, however, the witness who was questioned about a polygraph test was not the defendant, and there was no indication that his credibility was an important issue. Indeed, in Smith, we distinguished another case which had been reversed because the polygraph evidence concerned a :crucial Government witness ... who the Government attempted to rehabilitate" by asking about a polygraph test. Smith did not foreclose the possibility that a new trial might be required where, as here, the remarks about a polygraph test prejudiced a defendant whose credibility was vital to the case's outcome.

We find no error in the rulings, about which Brevard complains, pertaining to the bank employees' identification of him. The judgment of the district court is reversed, and the case is remanded for a new trial."

II. THE STATE COURTS HAVE DECIDED CASES HOLDING THAT QUESTIONING OF AN ACCUSED DEFENDANT AS TO HIS UNWILLINGNESS TO TAKE A LIE DETECTOR TEST CONTRARY TO SOME FEDERAL COURTS OF APPEAL, AND TO OTHER STATE COURTS, WHICH UPHOLD THE CONSTITUTIONAL RIGHTS OF THE ACCUSED.

We claim that once a Prosecutor has asked if an accused Defendant refused to take a lie detector test that irreparable damages and prejudice has been done, thus denying a Fair Trial guaranteed by the U.S. Constitution.

State cases so holding prejudicial error are:

State v. Kolander, (1952) 236 Minn. 209, 52 N.W. 2d 458;

Mills v. People, (1959) 139 Colo. 397, 339 P. 2d 998;

State v. Britt, (1959) 2353C395, 111 S.E. 2d 669;

State v. Sneed, 98 Ariz. 264, 403 P 2d 816;

State v. Hegel, 9 Ohio App. (2d) 12, (1964) (Defendant held denied a Fair Trial; Court did not give curative instructions).

State v. McDonald, (I2nd App) 328 N.E. 2d 436;

Some States cases hold that the error may be cured by instructions to the Jury. We cite: The Lucas County Court of Appeals in the instant cases:

State v. Holt, 17 Ohio St. 81, (1969) at 83; where the statement was made that Defendant took and failed a Lie Detector Test;

Stallings v. Commonwealth, (1977) 556 S.W. 2d 4;

State v. Bowen, 104 Ariz. 138, 449 Pnd 603;

People v. Baker, 7 Mich. App. 471 152 N.W. 2d 43;

People v. Bobcock, 223 Col. App. 2nd 2d 813, 36 Cal Rptr 178;

Pinkney v. State, (Fla.) 241 SO 2d 380.

I.B. FEDERAL COURTS OF APPEAL DECISIONS DENYING PREJUDICIAL ERROR FROM IMPERMISSIBLE QUESTIONING OF DEFENDANT OF WILLINGNESS TO TAKE LIE DETECTOR TEST.

This Counsel has found but one Federal Court of Appeals case supporting the above.

This general topic is discussed in 95 A.L.R.2d 819, "Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test," where the text reads in part at page 830:

"§7. Curative action.

[a] Held tending to cure.

It has been held in some cases that the prejudicial effect flowing from a disclosure at a trial of an accused's willingness or refusal to take a lie detector test was cured by action on the part of the trial judge.

In United States v. Bando (1957, CA2 NY) 244 F.2d 833, cert den 355 US 844, 2 L ed 2d 53, 78 S Ct 67, infra § 8[c], a prosecution witness testified that a defendant, after first agreeing to take a lie

> detector test, later refused. The trial judge sustained an objection to this testimony, stating to the jury that there was a difference of opinion as to the scientific validity of such a test. The court held that the trial judge's statement "put its finger on the disbelief," not only of scientists, but of people generally that such tests were reliable, and that the trial judge by his ruling and statement "avoided any unfavorable inferences."

Other state cases are then discussed, supporting the denial of prejudicial effect.

## CONCLUSION

The real point of judicial inquiry properly is whether the accused Defendant has been give a Fair Trial. Prosecutors, if so directed by this Court, will take effective steps to prevent deliberate mention of the accused Defendant's alleged unwillingness to take a Lie Detector Test, as the Prosecutor here deliberately did, although he claimed a right to introduce impermissible evidence to impeach. Accidental introduction of a Defendant's unwillingness to take a Lie Detector Test, can be avoided by Motions in Limine. All that this Court need do is so rule, and the Trial Courts throughout our great land will fall in line.

The average person in our area believes in Lie Detectors, and likewise, we submit, throughout the United States.

Here, the Voire Dire of the young 5 year old boy showed his lack of ability,

like any other child his age, really to understand what the oath required. And, the boy's testimony, even with help from the Prosecutor, showed simply that he was not even sure of wrong doing.

Accululatively, the impermissible testimony prejudiced Defendant.

Aour Constitution should prevent injustice.

We respectfully ask this Distinguished and Honorable Court, to issue a Writ of Certiorar to the relevant Ohio Courts.

Respectfully submitted,

John G. Rust
Attorney for Petitioner

CERTIFICATE OF SERVICE

Two copies of the foregoing Petition is served this February 13, 1989 on Dean P. Mandross, Esq., Prosecutor's Office, Lucas County Court House, Toledo, Ohio 43624.

John G. Rust
Attorney for Petitioner